

REMARKS

Claims 1-27 are pending in the present application. In the Final Office Action mailed October 10, 2007, the Examiner rejected claims 1, 2, 4-6, 11-15, and 17-19 under 35 U.S.C. §103(a) as being unpatentable over Deleryd, Mats; “On the Gap between theory and practice of process capability studies”, 1998, The International Journal of Quality and Reliability Management, Bradford, Vol. 15, Iss. 2, pg. 178 (hereinafter “Deleryd”) in view of “A SAS Institute White Paper: The Quality Data Warehouse – serving the analytical needs of the manufacturing enterprise”, © 1999, SAS Institute, pp. 1-11 (hereinafter “SAS”). The Examiner next rejected claims 3, 7, 9, 20-22, 24, 25, and 27 under 35 U.S.C. §103(a) as being unpatentable over Deleryd in view of “SAS” and further in view of Davis, Robert D; et al.; “Detecting Process Shifts with X-bar charts”, First Quarter 1993, Production and Inventory Management Journal, 34, 1, ABI/INFORM Global, p. 25 (hereinafter “Davis”). Claims 8, 10, 16, 23, and 26 were rejected under 35 U.S.C. §103(a) as being unpatentable over Deleryd in view of “SAS”, in view of Davis, and further in view of Harry, Mikel J; “Six Sigma: A breakthrough strategy for profitability”, May 1998, Quality Progress, 31, 5, ABI/INFORM Global, p. 60 (hereinafter “Harry”).

The Examiner has finally rejected claims 1-27 under §103(a). Applicant respectfully disagrees for reasons previously set forth in the response filed July 18, 2007. Additionally, for purpose of appeal, Applicant requests clarification regarding the “SAS” reference. The Examiner has not proven that the “SAS” reference is a “printed publication,” nor substantiated the date it is available as prior art. Therefore, the Examiner has not shown that “SAS” is prior art that may be used to support a §103(a) rejection against the present invention.

“A reference is proven to be a “printed publication” ‘upon a satisfactory showing that such document has been disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it.’” MPEP §2128; *In re Wyer*, 655 F.2d 221, 210 USPQ 790 (CCPA 1981) (quoting *I.C.E. Corp. v. Armco Steel Corp.*, 250 F. Supp. 738, 743, 148 USPQ 537, 540 (SDNY 1966)).

The Examiner has not provided enough information about the “SAS” reference, used in each rejection, to prove that “SAS” is a printed publication as defined by section 2128 of the MPEP. The Examiner has provided only a copyright date for “SAS”. In addition, the reference itself contains no showing to prove it is a printed publication. A copyright date often refers to the publication date of the “work.” 17 U.S.C. §101. However, the publication date, does not inform Applicant as to when or if the reference was “disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art, exercising

reasonable diligence, can locate it.” *Id.* A publication date may, at times, refer to the date the “work” was made available to the public. However, an “offering to distribute copies ... to a group of persons for purposes of further distribution, public performance, or public display [also] constitutes publication.” *Id.* (emphasis added). That is, the copyright date may merely refer to the date an offering to distribute the work for further distribution was made – not a date in which the document was disseminated or made available. In other words, it is possible that the “SAS” reference was disseminated or made available at a much later date than the copyright date, such as at a date after the filing date of the present Application. Accordingly, it is possible that the “SAS” reference became a “printed publication” after the filing of the present Application; therefore, the “SAS” reference may not be prior art.

As such, the Examiner has not proven that “SAS” is a printed publication that may be used to support a §103(a) rejection in the present matter. Even assuming that the “SAS” paper was a printed publication in 1999, the Examiner has not established when in 1999. Since the present application was filed in 2000, it is critical to identify when the document is available as prior art, if at all. Accordingly, Applicant requests withdrawal of the §103(a) rejections of claims 1- 27, or some proof that “SAS” is indeed a prior art printed publication, and when it was published. Without that, Applicant believes the BPAI will send the case back to the Examiner.

With regard to the substance of the Examiner’s §103(a) rejections of claims 1-27, Applicant stands by arguments set forth above as well as those previously set forth, and will save further elaboration and/or additions for an appeal if necessary.

Therefore, in light of at least the foregoing and the response filed July 18, 2007, Applicant respectfully believes that the present application is in condition for allowance. As a result, Applicant respectfully requests timely issuance of a Notice of Allowance for claims 1-27.

Applicant appreciates the Examiner’s consideration of these Amendments and Remarks and cordially invites the Examiner to call the undersigned, should the Examiner consider any matters unresolved.

Dated: December 10, 2007
Attorney Docket No.: GEMS8081.056

P.O. ADDRESS:

Ziolkowski Patent Solutions Group, SC
136 South Wisconsin Street
Port Washington, WI 53074
262-268-8100

Respectfully submitted,

/Mark J. Lambrecht/

Mark J. Lambrecht
Registration No. 59,263
Phone 262-268-8100 ext. 14
mjl@zpspatents.com